

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOWARD HSY,

Defendant.

NO. CR05-086Z

UNITED STATES'  
SENTENCING MEMORANDUM  
AND MOTION FOR DOWNWARD  
DEPARTURE

**FILED UNDER SEAL**

The United States of America, by John McKay, United States Attorney for the Western District of Washington, and Todd Greenberg, Assistant United States Attorney, files this Sentencing Memorandum.

**I. BACKGROUND**

Howard Hsy entered a plea of guilty to an Information charging the offense of Conspiracy to Violate the Arms Export Control Act, in violation of Title 18, United States Code, Section 371, and Title 22, United States Code, Section 2778. The statement of facts contained in the Plea Agreement, as well as the factual discussion in the Presentence Report, set forth a summary of the defendant's criminal conduct. Specifically, the statement of facts sets forth the following:

a. Beginning in or before 2002, and continuing through August 5, 2003, Howard Hsy and several unindicted coconspirators engaged in a scheme to willfully export from the United States technology on the U.S. Munitions List, without obtaining export licenses from the U.S. State Department. Three of Hsy's coconspirators lived in the Seattle, Washington area (collectively referred to as "Seattle coconspirators"). The primary coconspirator, "coconspirator #1,"

1 lived in Taiwan. As part of the conspiracy, coconspirator #1 requested that Hsy  
2 and the Seattle coconspirators procure military and dual-use technology on his  
3 behalf. After acquiring the requested technology, Hsy and coconspirator #1  
4 made arrangements to transport the items to Taiwan. Coconspirator #1 paid Hsy  
5 and the Seattle coconspirators a sum of money each time they successfully  
6 exported items from the United States. Toward the end of the conspiracy, Hsy  
7 learned that the items he caused to be exported from the United States were  
8 ultimately sent to People's Republic of China by coconspirator #1. Hsy  
9 discussed with the Seattle conspirators that the exported technology was being  
10 sent to China.

11 b. Some of the technology Hsy caused to be exported from the United  
12 States was listed on the U.S. State Department Munitions List, including, but not  
13 limited to: Imaging Systems F4949 "Generation III" night-vision goggles; HGV  
14 55/P Helmet Mount Assemblies (for use with Generation III" night-vision  
15 goggles); and Nightmate CCTV Adapter "Generation III" night-vision camera  
16 lenses. Hsy was specifically aware that it was illegal to export such technology  
17 without first obtaining an export license or written approval from the U.S. State  
18 Department. For example, in email correspondence with the Seattle  
19 coconspirators, Hsy discussed the fact that Generation III night-vision  
20 technologies required an export license. At no time did Hsy or any other  
21 member of the conspiracy obtain an export license or written approval from the  
22 U.S. State Department authorizing the exportations they caused.

23 c. In or about the Fall of 2002, coconspirator #1 requested that Hsy  
24 acquire Imaging Systems F4949 "Generation III" night-vision goggles. Hsy  
25 discussed this with the Seattle coconspirators, including the fact that the goggles  
26 were export-controlled. Hsy and the Seattle coconspirators acquired two of the  
27 goggles by using as a "front" a company owned by one of the Seattle  
28 coconspirators. One of the Seattle coconspirators falsely told the manufacturer  
of the goggles that the goggles would not be exported out of the United States.  
Hsy took possession of the goggles after they were delivered by the  
manufacturer. Thereafter, coconspirator #1 traveled from Taiwan to Seattle,  
Washington. Hsy gave the goggles to coconspirator #1, who hand-carried the  
goggles back to Taiwan without an export license.

19 d. In or about the Spring of 2002, coconspirator #1 requested that Hsy  
20 acquire Nightmate CCTV Adapter "Generation III" night-vision camera lenses.  
21 Using the same company as a "front," Hsy and the Seattle coconspirators  
22 acquired the lenses from the manufacturer. In order to make it appear that the  
23 lenses remained in the United States, the Seattle coconspirators arranged to send  
24 an empty box from the front company to an address in Santa Anna, California,  
25 which was provided by coconspirator #1. Hsy took possession of the lenses  
26 after they were delivered by the manufacturer. Thereafter, coconspirator #1  
27 traveled from Taiwan to Seattle. Hsy gave the lenses to coconspirator #1, who  
28 hand-carried the lenses back to Taiwan without an export license.

25 e. In or about 2003, coconspirator #1 asked Hsy to acquire HGV 55/P  
26 Helmet Mount Assemblies, which are used in conjunction with the night-vision  
27 goggles Hsy previously acquired. Hsy acquired the helmet mounts, and was  
28 aware that they were export-controlled. Hsy personally hand-carried the helmet  
mounts from Seattle to Taiwan, without obtaining an export license. Hsy  
delivered the helmet mounts to coconspirator #1 in Taiwan.

1 It is important to note that the criminal scheme was on-going when it was  
 2 interrupted by Hsy's arrest in Taiwan on August 5, 2003. Unbeknownst to Hsy and the  
 3 other participants, they had been the subject of criminal investigations both in Taiwan  
 4 and in the United States (by the FBI).

## 5 **II. OBJECTIONS TO THE PRE-SENTENCE REPORT**

6 The Presentence Report sets forth the following calculations under the U.S.  
 7 Sentencing Guidelines:

|    |                                   |           |
|----|-----------------------------------|-----------|
| 8  | Base offense level (USSG § 2M5.1) | 26        |
| 9  | Acceptance of responsibility      | -3        |
| 10 | <u>Total offense level</u>        | <u>23</u> |

11 In the Plea Agreement, the parties stipulated that the defendant was a minor  
 12 participant in the conspiracy, and thus that a two-level downward adjustment was  
 13 applicable pursuant to USSG § 3B1.2(b). The Probation Office disagrees with this  
 14 assessment, and did not apply the two-level reduction. The government recognizes that  
 15 this is a close issue, with meritorious arguments on both sides of the matter. From the  
 16 government's perspective, however, Hsy had a minor role in the offense in comparison  
 17 to the individual described as "coconspirator #1" in the plea agreement, James Yeh.  
 18 Yeh was a Taiwanese citizen who initiated the entire course of criminal conduct. Yeh  
 19 tasked Hsy with the technologies he wanted to acquire. Thus, Yeh directed Hsy's  
 20 activities. Hsy acquired the technologies at issue only after being tasked by Yeh to do  
 21 so. Thus, the government respectfully submits that the minor role adjustment is  
 22 applicable. With this one exception, the government does not have any objections to  
 23 the Presentence Report.

## 24 **III. MOTION PURSUANT TO U.S.S.G. § 5K1.1**

25 Pursuant to Section 5K1.1 of the United States Sentencing Guidelines, and Title  
 26 18, United States Code, Section 3553(e), the United States hereby moves this Court to  
 27 depart from the sentencing guideline range and the statutory mandatory minimum  
 28 sentence, based on the defendant's provision of substantial assistance in the

1 investigation of other persons who have committed offenses against the United States.

2 **IV. THE DEFENDANTS' COOPERATION**

3        Shortly after his arrest in Taiwan, Hsy began cooperating with U.S. law  
4 enforcement authorities. He has met with FBI agents, ICE agents, and prosecutors on  
5 multiple occasions. His cooperation has been valuable to the government in three  
6 primary respects.

7        First, he provided truthful and complete information concerning the offense of  
8 conviction, and the participation therein of the coconspirators. Hsy's information  
9 directly led to the felony conviction of coconspirator Donald Shull in the case of United  
10 States v. Donald Shull, CR05-360Z. Hsy was willing to provide testimony against  
11 Shull, which was essential in enabling the government to negotiate a plea agreement  
12 with Shull.

13        Second, Hsy provided cooperation with an on-going federal investigation in San  
14 Francisco in the case of United States v. Phillip Chen. Hsy was an associate of Chen,  
15 and was interviewed by prosecutors and FBI agents in the Chen case. Hsy also agreed  
16 to testify against Chen. The Chen case proceeded to trial in February 2006; the trial is  
17 still on-going. Although Hsy was designated as a witness on the government's witness  
18 list, for tactical reasons the AUSAs decided not to call Hsy to testify. Nonetheless, the  
19 agents and prosecutors on the Chen case believed that Hsy's information was truthful  
20 and complete.

21        Third, Hsy's information assisted the government in determining that the  
22 criminal scheme he engaged in was not broader or more widespread than had become  
23 known to the FBI. Thus, the FBI was able to confirm that the damage to national  
24 security was minimal.

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1 **V. UNITED STATES' SENTENCING RECOMMENDATION**

2 Pursuant to the Sentencing Guidelines as calculated in the Plea Agreement, the  
3 total offense level is 21, the defendant's criminal history category is I, and the resulting  
4 sentencing range is a term of imprisonment of between 37 and 46 months, and a fine  
5 range of between \$7,500 and \$75,000. The United States respectfully recommends that  
6 the Court impose a sentence of **probation for two years, and a fine of \$75,000**. The  
7 government submits that this sentence is appropriate for the following reasons.

8 1. As set forth above, Hsy's cooperation constituted "substantial assistance."

9 2. Following his arrest in Taiwan, Hsy demonstrated an extraordinary  
10 willingness to accept responsibility for his actions. Hsy was arrested and charged in  
11 Taiwan on August 5, 2003. He was not allowed to return home to the United States  
12 until December 2005, when the case against him in Taiwan was resolved. Shortly after  
13 his arrest in 2003, however, the FBI contacted Hsy in Taiwan and informed him that he  
14 was also under investigation in the United States. Many people in Hsy's position would  
15 have either delayed dealing with any potential consequences in the U.S. until they  
16 returned home years later, or would have opted to permanently relocate to Taiwan in  
17 order to avoid U.S. charges. Hsy did not elect either of these paths.

18 Rather, Hsy voluntarily met with FBI agents and prosecutors in Taiwan, and  
19 began his cooperation. Hsy subsequently hired defense counsel, negotiated the terms of  
20 a plea agreement with the government, and signed a written plea agreement, all while  
21 he remained in Taiwan. The government filed with this Court the signed plea  
22 agreement on March 4, 2005, although Hsy still remained in Taiwan. After the  
23 Taiwanese case was resolved, Hsy coordinated his return to the U.S. through the U.S.  
24 Attorney's Office and FBI, and he promptly entered his guilty plea upon his return.  
25 This course of conduct speaks volumes for Hsy's acceptance of responsibility, and his  
26 efforts to assist the government after his arrest.

27 3. Hsy served approximately two months in a Taiwanese jail immediately  
28 following his arrest in August 2003. By all accounts, the conditions were

1 uncomfortable. Hsy subsequently was on supervised release for approximately two  
2 years in Taiwan, pending the resolution of his case. The government's sentencing  
3 recommendation takes into account these periods of custody and supervision in Taiwan.  
4 In addition, Hsy was convicted of a criminal offense in Taiwan. Thus, Hsy now has a  
5 criminal history in both the U.S. (a serious felony conviction) and in Taiwan (a lesser  
6 offense).

7 4. Hsy's history and characteristics weight in favor of a probationary sentence.  
8 Hsy is 70 years old, and has no prior arrests or criminal history. He is a retired Boeing  
9 employee. The government does not anticipate that Hsy will be involved in any future  
10 criminal conduct.

11 5. A probationary sentence in this case would be consistent with the sentence  
12 this Court imposed upon coconspirator Donald Shull. Shull was a lesser participant in  
13 the conspiracy, profited to a lesser extent than did Hsy, but he did not cooperate with  
14 the government. Shull was sentenced to two years' probation and a fine of \$10,000.

15 6. The Sentencing Guidelines fine range in this case is \$7,500 - \$75,000. The  
16 government believes that a fine at the high-end of this range, \$75,000, is justified for  
17 two reasons. First, it is an appropriate component of punishment for Hsy's offense,  
18 which was primarily, if not exclusively, motivated by greed. Second, a fine of \$75,000  
19 would disgorge Hsy of the majority of profits he earned as a result of the conspiracy.  
20 It is difficult for the government to estimate precisely the total profits Hsy realized as a  
21 result of the criminal conduct in this case. However, the government is aware that  
22 during conversations with his coconspirators, Hsy stated that he made \$100,000 during  
23 the venture. Financial records in possession of the government confirm that Hsy  
24 received payment from James Yeh of \$31,000 for some of the goggles that were  
25 exported. Assuming that Hsy was paid similar amounts for the other exported  
26 products, his estimate of \$100,000 may be accurate. In any event, the government  
27 believes that a fine of \$75,000 is sufficient for the purposes of punishment and  
28 disgorgement.

1           WHEREFORE, the government respectfully recommends that the Court impose  
2 a sentence of two years' probation and a fine of \$75,000.

3           DATED this 16th day of March, 2006.

4   Respectfully submitted,

5   JOHN McKAY  
6   United States Attorney

7   /s Todd Greenberg  
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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

s/Leah Melendy  
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